

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.19 Motion to Suppress Confession for Violation of Sixth Amendment Right to Counsel

Insert the following case summary near the top of page 39, immediately before the last paragraph of Section 6.19:

A defendant's Sixth Amendment right to counsel was violated when the defendant's former friend and neighbor (Heintzelman) was permitted to testify at the defendant's trial about inculpatory statements the defendant made during a late-night conversation. Heintzelman, a reserve deputy in full uniform at the time of the conversation, had with the defendant in his maximum-security jail cell. *People v McRae*, ___ Mich ___, ___ (2004).

The prosecution argued that Heintzelman's testimony was admissible because he was not acting in his official capacity at the time he spoke with the defendant. *McRae, supra*, ___ Mich at ___. The Michigan Supreme Court disagreed and found that Heintzelman's status was indisputably that of a state actor because, in addition to the fact that Heintzelman was in full uniform when he visited the defendant, the late-night visit to the defendant's maximum-security cell was facilitated only because of Heintzelman's status as a reserve deputy. *McRae, supra*, ___ Mich at ___. According to the Court:

“[I]t was only by virtue of his status as a reserve deputy that Heintzelman was granted direct access to defendant's maximum-security cell, a restricted area where only governmental agents are normally allowed to tread. Further, this access was granted late at night, a time when ordinary citizens are prohibited from visiting inmates [footnote omitted].” *McRae, supra*, ___ Mich at ___.

The prosecution also argued that Heintzelman's testimony was properly admitted regardless of his status because the defendant had specifically requested to speak with Heintzelman and thus, the state had not impermissibly

initiated contact with the defendant following invocation of his right to counsel. *McRae, supra*, ___ Mich at ___. The Court disagreed and noted that when the defendant asked to speak with Heintzelman he was unaware that Heintzelman had joined the ranks of law enforcement. *McRae, supra*, ___ Mich at ___. The prosecution argued that the content of the conversation was still properly admitted under *Edwards v Arizona*, 451 US 477, 484 (1981), because the defendant initiated the dialogue and spoke to Heintzelman even after seeing he was a reserve deputy. *McRae, supra*, ___ Mich at ___.

The *McRae* Court disagreed and explained that, even after *Edwards*, “[t]he initiation of a conversation related to the investigation, standing alone, is insufficient to establish a waiver of the previously asserted right to counsel.” *McRae, supra*, ___ Mich at ___. In *McRae*, not only was the defendant’s request to speak with Heintzelman the only evidence in support of the testimony’s admissibility under *Edwards*, the Court pointed out that the record evidence established that the defendant did not wish to speak about the crime and did so only after repeated efforts by Heintzelman to direct the conversation. *McRae, supra*, ___ Mich at ___. The Court stated:

“Pursuant to [*Oregon v*] *Bradshaw* [, 462 US 1039 (1983)], the defendant must initiate communication concerning the investigation in order to avoid running afoul of the rule articulated in *Edwards* [footnote omitted].

* * *

“Even solely reviewing Heintzelman’s testimony regarding his conversation with defendant, there is no proof evincing a desire on the part of defendant to pursue a discussion relating directly or indirectly to the investigation. Defendant merely initiated a social visit with his old friend and neighbor. It was Heintzelman, not defendant, who initiated all questioning relating to the investigation and charges against defendant for the murder of Randy Laufer.” *McRae, supra*, ___ Mich at ___.

Part 2—Individual Motions

6.23 Motion to Dismiss Because of Double Jeopardy— Successive Prosecutions for the Same Offense

1. The “Same-Elements” Test Determines Whether Double Jeopardy Protection Is Implicated

Revise the subheading as indicated and replace the text on pages 51–52 with the following case summary:

The Michigan Supreme Court readopted the “same-elements” test to determine whether the prohibition against double jeopardy is violated when multiple charges are brought against a defendant for conduct related to a single criminal transaction. *People v Nutt*, ___ Mich ___, ___ (2004). In *Nutt*, the Court overruled its decision in *People v White*, 390 Mich 245 (1973), where the Court disapproved of the “same-elements” test in favor of the “same transaction” test as the means of resolving double jeopardy issues. The “same transaction” test generally prohibited serial prosecutions of a defendant for entirely different crimes arising from a single criminal episode or “transaction.” *Nutt, supra*, ___ Mich at ___. Until the *White* decision in 1973, Michigan courts had interpreted the prohibition against double jeopardy as precluding multiple prosecutions of a defendant for crimes involving identical elements. *Nutt, supra*, ___ Mich at ___.

In *Nutt*, the defendant pleaded guilty in a Lapeer County Court of one count of second-degree home invasion. *Nutt, supra*, ___ Mich at ___. Later, the defendant was bound over for trial in Oakland County on the charge of receiving and concealing a stolen firearm—the firearm was obtained in the defendant’s admitted participation in the Lapeer County theft. *Nutt, supra*, ___ Mich at ___. The defendant moved to dismiss the receiving and concealing charge because *White* required the state “to join at one trial all charges arising from a continuous time sequence that demonstrated a single intent and goal.” *Nutt, supra*, ___ Mich at ___.

The Michigan Supreme Court concluded that it had incorrectly construed the meaning of the constitutional phrase “same offense” in its *White* decision because the ratifiers of the 1963 Constitution intended that “same offense” be accorded the meaning given its federal counterpart and that it be interpreted consistently with “state and federal double jeopardy jurisprudence as it then existed.” *Nutt, supra*, ___ Mich at ___. The Court stated that the *White* Court “strayed from [the ratifiers’] intent when it adopted the same transaction test” and explained that the remedy for that error required a “return to the same-elements test, which had been consistently applied in this state until its abrogation . . . in 1973 [footnote omitted].” *Nutt, supra*, ___ Mich at ___.

Michigan’s return to the same-elements test signifies a return to “the well-established method of defining the Fifth Amendment term ‘same offence’”

known as the *Blockburger* test. *Nutt, supra*, ___ Mich at ___; *Blockburger v United States*, 284 US 299, 304 (1932). The *Blockburger* test “focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.” *Nutt, supra*, ___ Mich at ___, quoting *Iannelli v United States*, 420 US 770, 785 n 17 (1975).

The same-elements test, as dictated directly by the *Blockburger* Court, provides:

“The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Blockburger, supra*, 284 US at 304; *Nutt, supra*, ___ Mich at ___.

As applied to the *Nutt* case, the Court determined that the defendant could properly be tried for the receiving and concealing charge even though she pleaded guilty to the offense from which the stolen property was obtained. *Nutt, supra*, ___ Mich at ___. Because the elements required to convict her for each offense were not identical, the defendant’s protection from double jeopardy was not violated. *Nutt, supra*, ___ Mich at ___. Specifically, the defendant’s conviction for second-degree home invasion required proof that (1) the defendant entered a dwelling by breaking or entered without permission, and (2) the defendant entered with the intent to commit a felony or larceny in the dwelling. *Nutt, supra*, ___ Mich at ___. The defendant’s conviction for receiving and concealing a stolen firearm required proof that (1) the defendant received, concealed, stored, bartered, sold, disposed of, pledged, or accepted as security for a loan, (2) a stolen firearm or stolen ammunition, and (3) the defendant knew that the firearm or ammunition was stolen. *Nutt, supra*, ___ Mich at ___. The Court explained:

“Clearly, there is no identity of elements between these two offenses. Each offense requires proof of elements that the other does not. Because the two offenses are nowise the same offense under either the Fifth Amendment or art 1, § 15, we affirm the result reached by the Court of Appeals majority and hold that defendant is not entitled to the dismissal of the Oakland County charge.” *Nutt, supra*, ___ Mich at ___.